Supreme Court, U.S.
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# NO. 91-1205

## In the Supreme Court of the United States

OCTOBER TERM, 1991

CATHY LAVERGNE,
Petitioner,

VERSUS

CAMERON IRON WORKS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF OF RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the appellate court properly affirmed a directed verdict entered in favor of the defendant manufacturer, pursuant to the guidelines set out by this Court in *Anderson v. Liberty Lobby, Inc.*, where plaintiff failed to adduce any evidence, substantial or otherwise, in support of the essential elements of her product liability claim.

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The opinions of the United States District Court and the United States Court of Appeals for the Fifth Circuit were not officially reported. Both opinions are reprinted in the appendix.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO. 91-1205

CATHY LAVERGNE,
Petitioner,

VERSUS

CAMERON IRON WORKS, INC.,
Respondents.

## BRIEF OF RESPONDENT IN OPPOSITION

### STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the district court and appellate court, both of which appear in the appendix.[1]

### SUMMARY OF ARGUMENT

The appellate court strictly adhered to the guidelines set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

[1] The interested parties consist of Cathy Lavergne; her minor son, Quinton Lavergne; Cameron Iron Works, Inc.; and Cooper Industries, Inc. Cameron was purchased by Cooper Industries following the accident. The merger of the two companies was finalized on November 29, 1989.

106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) in affirming the directed verdict granted by the district court. Although Lavergne insists that factual questions were presented for a jury to decide, both the district and appellate courts concluded that Lavergne had adduced no evidence to create a factual dispute eligible for jury submission. Nor did the directed verdict contravene Lavergne's Seventh Amendment right to a jury trial. The Seventh Amendment has never been interpreted in the manner advocated by Lavergne. To the contrary, this Court long ago held that a motion for directed verdict is not inconsistent with the Seventh Amendment. *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Because Lavergne's petition fails to raise any issue worthy of review by this Court, it should be denied.

## ARGUMENT

The appellate court affirmed the trial court's finding that Lavergne had adduced "no substantial probative evidence that the accident was caused by anything other than the inadequate threading on the substitute bolts."[2] Furthermore, the appellate court held that Lavergne presented *no evidence* that the clamp would have failed due to the excess pressure regardless of the size and threads of the bolts used; *no evidence* suggesting that the alteration occurred before the clamp left the Cameron plant; *no evidence* that Cameron had knowledge of any improper substitution of bolts prior to the accident; and *no evidence* that the altered bolts, which clearly weakened the clamp, were not the cause of its failure.[3]

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[2] Fifth Circuit's opinion, p. A-7.

[3] Fifth Circuit's opinion, p. A-7 through A-8.

Under Federal Rule of Civil Procedure 50(a), a trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson*, 477 U.S. at 250; 106 S.Ct. at 2511 (1986). The focus of the inquiry is: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.*, 477 U.S. at 251-52, 106 S.Ct. at 2512. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Id.*, 477 U.S. at 252, 106 S.Ct. at 2512.[4] Based on the absence of controvertible evidence presented by Lavergne, the appellate court properly sustained the directed verdict.

Lavergne, however, contends that the appellate court misinterpreted *Anderson* and improperly weighed the evidence.[5] These contentions are meritless. In order for there to be a weighing of evidence, one party must present facts that dispute those adduced by the opponent. Here,

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[4] That a scintilla of evidence is not enough is especially true in cases where the party against whom a directed verdict is entered had the burden of proof. *Liberty Leather Corp. v. Callum*, 653 F.2d 694 (2nd Cir. 1981); *Owens v. International Paper Co.*, 528 F.2d 606 (5th Cir. 1976), *reh. den.* 532 F.2d 186.

[5] A party against whom a verdict is directed has the onus of demonstrating the existence of a conflict in the evidence, or inferences to be drawn therefrom, sufficient to justify submission of the question to the jury. *Richardson v. City of Indianapolis*, 658 F.2d 494 (7th Cir. 1981), *cert. den.* 455 U.S. 945, 102 S.Ct. 1442, 71 L.Ed.2d 657. Furthermore, in order to claim the benefit of favorable inferences, the party against whom the verdict is directed must present "substantial evidence" in support of its claim, i.e., evidence which a reasonable mind might accept as adequate to support a conclusion. *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), *cert. den.* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116.

two courts found on the critical issues of manufactured condition, subsequent alteration, causation, misuse, sophisticated user and failure to warn, that Lavergne offered *no evidence* to contradict the evidence advanced by Cameron.

**Manufactured Condition** - Lavergne introduced no evidence to establish what the condition of the clamp was when it left Cameron's control, or that the clamp's manufactured condition posed an unreasonable risk of danger. The only evidence adduced in this regard was from Cameron, which established that the clamp's bolts had been materially altered after it was sold.[6]

**Subsequent Alterations** - Only Cameron introduced evidence demonstrating the extent and effect of the alterations. Cameron showed that three out of the four bolts were replaced with bolts that were not of the type that originally came with the clamp, that the bolts probably came from a different size Cameron clamp, and that they had to be machined to fit this clamp. Cameron also showed that the altered bolts were shorter than the bolts designed to be used with the clamp, and that their thread length was only 2.2″ compared to the 5.5″ thread length of a correct bolt. Because of this, the bolts could not be completely inserted through the nuts, thereby allowing less than full thread engagement. None of this evidence was controverted by Lavergne.

**Causation** - Lavergne offered no evidence to dispute the effect the altered bolts had on the clamp's ability to

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[6] Under Louisiana law, to recover from a manufacturer in strict liability for a defective product, the plaintiff must prove that the defective condition existed at the time the product left the manufacturer's control as well as that the condition made the product unreasonably dangerous to normal use. *Beck v. Somerset Technologies, Inc.*, 882 F.2d 993, 996 (5th Cir. 1989).

perform, or that the accident would not have occurred if the clamp had been outfitted with the correct bolts. The reduction in thread engagement of almost 1″, or 32%, subjected the threads that were engaged to greater stress and substantially weakened the connection to the point that the threads of the two altered bolts on the same side of the clamp gave way. In contrast, the nuts and bolts on the opposite side of the clamp, which had one correct bolt and one altered bolt, sustained no damage. The testimony was uncontradicted that the altered bolts caused the clamp to come apart, and had the clamp been equipped with the correct bolts, it would not have separated even at 15,000 psi.

**Misuse** - Because the wellhead had a rated working pressure of 10,000 psi, industry standards required that it be tested at 15,000 psi. Since the clamp and the other equipment used for the test were not the object of the test, but only instruments to perform it, all should have had a minimum rated working pressure of 15,000 psi. Nevertheless, Vetco chose to use the clamp, because the recommended equipment listed in Vetco's specifications was unavailable, and the clamp was the only fastening mechanism at Vetco's facility that would fit the other equipment needed to seal the wellhead. Furthermore, Vetco's use of the clamp in this fashion was not an isolated occurrence. Vetco personnel testified that for a year prior to the accident, the clamp was subjected to repeated pressurizations at 15,000 psi. Once again, Lavergne adduced no evidence to controvert these facts.

**Sophisticated User** - Lavergne never rebutted evidence adduced by Cameron that Vetco and Cameron were the oil industry's "two big manufacturers" of high pressure clamps. Cameron further showed that Vetco's knowledge of clamps and their capabilities was extensive. Cameron adduced evidence that Vetco maintained an in-

house engineeering staff, whose expertise was "as sophisticated" as Cameron's, to design its own line of clamps; that Vetco listed the same information regarding size and rated working pressure on the clamps it made; and that the Vetco specifications for wellhead testing, prepared by its engineers, contained extensive information on the Cameron clamp in question, including its dimensions and its rated working pressure of 10,000 psi.

**Failure to Warn** - To defeat this issue, Cameron showed that the 10,000 psi limitation, cast into the top of the clamp halves, conveyed simple and straightforward information regarding the clamp's pressure limitation. The warning traveled with the clamp, was not subject to removal or obliteration, and was easy to observe. Furthermore, it conformed to the universal standard used by oil industry manufacturers to designate an equipment's maximum working pressure. No other designation but 10,000 psi was placed on the clamp to avoid confusion, or the possible supposition that the clamp could be safely used on a routine basis at a pressure level greater than 10,000 psi.[7] Most important of all, the Vetco witnesses who worked on the test testified that they knew the clamp was rated at

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[7] The cases cited by Lavergne in an attempt to establish a failure to warn claim are inapposite. In all but one, no warning was provided by the manufacturer, whereas here there was a clear and concise warning; in the one exception, the user never read the warning that was given. *Boudreaux v. Jack Eckerd Corp.*, 854 F.2d 85 (5th Cir. 1988) (no warning that eyeglasses could shatter); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987) (no notice on compressor advising of the presence of an internal ladder); *Reilly v. Dynamic Exploration, Inc.*, 571 So.2d 140 (La. 1990) (no warning against burying valve); *Weber v. Caterpillar Machinery Corp.*, 542 So.2d 544 (La. App. 5th 1989), *writ den.* 548 So.2d 332 (no warning against removal of doors on forklift); *Bloxom v. Bloxom*, 512 So.2d 839 (La. 1987) (although warning given of catalytic converter's incendiary propensities, when car parked over combustible materials, owner did not read owner's manual containing warning and manufacturer was exonerated).

10,000 psi and that it was unsafe to ignore the limitation. Although Lavergne contends Cameron should have warned against using the clamp at 15,000 psi, this would have been superfluous in light of the lower 10,000 psi limitation. Likewise, Lavergne's argument that Cameron knew the bolts would be replaced misses the mark. Replacing the original bolts with the correct bolts was not the issue, but whether Cameron could have foreseen that bolts apparently salvaged from another clamp and drastically altered would be used in this manner. On the point, Lavergne adduced no evidence that Cameron had knowledge of an improper substitution of bolts or that it was foreseeable that smaller bolts from another clamp would be machined to fit this clamp.

Due to Lavergne's failure to dispute each of these issues with any probative evidence, there was no disagreement to submit to the jury and the trial court, as required, directed a verdict in Cameron's favor, which the appellate court under *Anderson* correctly affirmed. Furthermore, the affirmance is in accord with decisions rendered by this and other circuits. In *Goldsmith v. Olon Andrews, Inc.*, 941 F.2d 423 (6th Cir. 1991), a directed verdict in favor of a helicopter manufacturer in a wrongful death action was affirmed, where the helicopter which crashed was built from spare parts, and there was insufficient evidence for a jury to hold the manufacturer responsible for placing the product in commerce. Similarly, in *Johns v. Jarrard*, 927 F.2d 551 (11th Cir. 1991), the court affirmed a directed verdict in a medical malpractice case where plaintiffs failed to create a jury question on the issue of causation. And, in *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308 (5th Cir. 1990), a products liability action against a coupling manufacturer was dismissed on directed verdict, because the injured plaintiff failed to present sufficient evidence to establish that the coupling was defective or that the

manufacturer's failure to label the coupling with its pressure rating was the most probable cause of its failure.

## CONCLUSION

Lavergne seeks to relitigate in this court factual assertions not supported by the trial record, that have been carefully reviewed by the appellate court and rejected. Beyond this, Lavergne's petition fails to raise any "special and important" reason that could mandate this Court's review of this matter, nor does the petition demonstrate that the appellate court's decision is in conflict with another appellate court on the same matter, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.[8] Accordingly, Lavergne's petition should be denied.

**Respectfully submitted,**

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[8] Rule 10 of Rules of the Supreme Court of the United States.

## CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on petitioner through her counsel of record, Arthur Cobb, Esq., Cobb & Cobb, 300 Louisiana Avenue, Suite 101, Baton Rouge, Louisiana 70802-5803, by placing same in the United States mail, postage prepaid and properly addressed, this 2nd day of March, 1992.

S/HOWARD L. MURPHY

HOWARD L. MURPHY

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 90-4558
Summary Calendar

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CATHY LAVERGNE,

Plaintiff-Appellant,

versus

CAMERON IRON WORKS, INC.,

Defendant-Appellee.

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Appeal from the United States District Court for the
Western District of Louisiana
(CA-87-2595 c/w 88-1089-"L")

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(September 11, 1991)

Before KING, GARWOOD, and DUHE', Circuit Judges.[1]

GARWOOD, Circuit Judge:

Plaintiff-appellant Cathy Lavergne (Lavergne)

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

brought this products liability action against defendant-appellee Cameron Iron Works (Cameron) to recover damages for the death of her late husband, Glen Lavergne (decedent), who was killed by the failure of a clamp manufactured by Cameron. Lavergne alleged that Cameron was strictly liable because the accident was caused either by Cameron's failure to warn against using the clamp at pressures exceeding its rated working pressure or by a manufacturing defect in the clamp. The district court granted a directed verdict in favor of Cameron holding that Lavergne had failed to adduce sufficient evidence to enable a reasonable jury to find that a manufacturing defect or a failure to warn caused the accident. We agree and accordingly affirm.

**Facts and Proceedings Below**

Decedent, an employee of BOP Pressure Testers, Inc., was killed on the premises of Vetco Gray, Inc. (Vetco) on October 30, 1986. Decedent was at Vetco to assist in the pressure testing of a Shell Offshore, Inc. (Shell) wellhead that had been refurbished by Vetco. Vetco employees, in order to seal off the wellhead for the test, had attached a connector to the top of the wellhead. A blind hub was secured to the connector using an 18-3/4", Cameron #27 swing bolt clamp (the clamp). The clamp, which had a rated working pressure of 10,000 psi, consisted of two C-shaped halves that were connected by two bolts on each side. One end of each bolt was attached to the clamp by a pin and the other end of each bolt swung into slots located on the opposite clamp half. The bolts were secured with nuts that fastened to the end of each bolt. The wellhead was placed in front of two metal safety screens owned and erected by Vetco. They were positioned at a ninety degree angle to each other. The entire test assembly had been constructed before decedent arrived at the Vetco yard.

When decedent arrived, he parked his truck behind the screens. He connected a hose between a high volume pump on his truck and a valve on the blind hub. He had instructions from Vetco to test the wellhead up to 15,000 psi, one and one-half times the rated working pressure of both the clamp and the wellhead. Decedent repeatedly attempted to apply pressure to the wellhead but was unsuccessful due to various equipment problems. On several occasions, he changed the hose between the pump and the wellhead because of leaks.

A Vetco employee, Gerald Elter (Elter), saw decedent standing on the wellhead while it was under pressure of 15,000 psi. Elter immediately told another Vetco employee to release the pressure on the wellhead and he told decedent not to leave the area behind the safety screens while pressure was on the wellhead. Elter left the area and decedent finished his repairs and continued testing. Decedent subsequently reapplied pressure to the wellhead and the clamp blew off. The nuts were stripped from two of the bolts on one side of the clamp and half of the clamp struck decedent, instantly killing him. Decedent apparently was on top of the wellhead when the accident occurred.

Lavergne, on behalf of herself and decedent's and her minor son, Quinton Lavergne, brought a products liability claim against Vetco, Shell, and Cameron, the manufacturer of the clamp. The district court granted summary judgment in favor of Shell on the ground that it did not control the work of its independent contractor, Vetco. The court granted summary judgment in favor of Vetco on the ground that Vetco was decedent's statutory employer. Lavergne's claim against Cameron went to trial.

Cameron moved for a directed verdict at the close of Lavergne's case. The court took the motion under advise-

ment. At the close of all of the evidence, Cameron again moved for a directed verdict. The court granted the motion and entered judgment for Cameron on May 21, 1990. Following denial of her timely motion for a new trial, Lavergne timely brought this appeal.

**Discussion**

The subject matter jurisdiction of this case is based on diversity; the case therefore is controlled by Louisiana law. In Louisiana, to recover under a strict products liability theory the plaintiff must prove "(1) that the injury or damage resulted from the condition of the product; (2) that the condition made the product unreasonably dangerous to normal use; and (3) that the condition existed at the time the product left the control of the [defendant] manufacturer or supplier." *Bell v. Jet Wheel Blast, Div. of Ervin Indust.*, 462 So.2d 166, 168 (La. 1985).

The district court held that Lavergne had failed to make a sufficient showing that Cameron was responsible for the failure of the clamp, determining that the following matters were established by the undisputed evidence or that there was not sufficient evidence to the contrary on which a verdict for Lavergne could be rationally based.

The district court found that the clamp was clearly marked to show that its rated working pressure was 10,000 psi and that this marking was sufficient to warn any knowledgeable user that the clamp was not to be used regularly above that level of pressure. The court found that Cameron marketed the clamp only to knowledgeable users such as Vetco.

The court found that Vetco misused the clamp in disregard of the warning. The court reasoned that

although, under industry custom, equipment including a clamp may be occasionally *tested* at pressure levels exceeding its maximum rated level, it is not proper *regularly* to subject a clamp to pressure in excess of its rated level. The court found that the clamp had been repeatedly subjected to pressures exceeding 10,000 psi and decedent repeatedly subjected the clamp to a pressure of 15,000 psi. The court therefore held that there was no failure to warn because a manufacturer is not required to warn a sophisticated or knowledgeable user of dangers of which they are or should be aware. *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976) (applying Louisiana law), *cert. denied*, 97 S.Ct. 1111 (1977).

The court also found that the clamp was not new and had been substantially altered since the date of its manufacture. Cameron manufactured the clamp some time between 1974 and 1976. Three of the bolts on the clamp were not of the type that originally came with the clamp that failed. These two bolts were apparently manufactured by Cameron but they were intended to be used with a different size clamp. They were shorter both in overall length and in the length of their threading than the original bolts.[2] The bolts had been machined down to fit in the clamp used on the wellhead. The threading engagement was considerably weakened and the overall strength of the clamp was materially reduced by the use of the smaller bolts.

A "manufacturer is under no duty 'to make a product that will last forever or will withstand abuse or lack of maintenance' or that is 'foolproof,' nor one whose component 'parts do not wear out.' " *Scott v. White Trucks*, 699

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[2] The thread length of the replacement bolts was 2.2", compared with the 5.5" length of the threading on the correct bolts.

F.2d 714, 717 (5th Cir. 1983) (applying Louisiana law) (citations omitted). "[L]apse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of a defect existing at the time of manufacture." *Norris v. Bell Helicopter Textron*, 495 So.2d 976, 978 (La. Ct. App. 1986).

The district court concluded that no one knew how and where the clamp had been used during the minimum of ten years it was in existence. Nor did any one know when or how the clamp was altered. The court found that the clamp was not in the same condition it was in when it first left Cameron. The court found that the age, alterations to the clamp, and its misuse in disregard of the warning caused the accident and that Lavergne had failed to make a contrary showing sufficient for a reasonable jury to impose liability on Cameron.

The proper standard to apply in reviewing a directed verdict is " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' "[3] *Chiari v. City of League City*, 920 F.2d 311, 314-15 (5th Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512 (1986)). "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 106 S.Ct. at 2511.

We agree with the district court's determinations respecting the role of the alteration to the clamp in causing the accident and we conclude that these determinations

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[3] In a diversity case, we apply a federal rather than a state standard for determining whether there is sufficient evidence to create a jury question. *Hagan v. EZ Mfg. Co.*, 674 F.2d 1047, 1051 (5th Cir. 1982).

constitute sufficient grounds to support the directed verdict. In Louisiana, "a manufacturer can not be held liable for injuries caused by a defective product where the defect was created by an alteration which amounts to an intervening or superseding cause." *St. Pierre v. Gabel*, 351 So.2d 821, 824 (La. Ct. App. 1977). We determine that the record evidence does not reasonably support the conclusion that the accident was caused by a manufacturing defect in the ten-year-old clamp as opposed to being caused by the substantial alterations made to the clamp after it left Cameron's control.

We have previously stated that "[i]f [a plaintiff] fails to introduce sufficient evidence to enable a jury to find that either a defect in the product or defendant's negligence most probably caused the accident, then the trial court should enter a directed verdict in favor of the defendant." *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990). Lavergne adduced no substantially probative evidence that the accident was caused by anything other than the inadequate threading on the substitute bolts. Lavergne introduced evidence that the same type of clamp that Vetco was using had failed on two prior occasions while being tested at pressures in excess of 10,000 psi by Cameron employees at two different Cameron plants. In one instance, the clamp failed when the threading on the bolts stripped.

The evidence of the two prior failures is not adequate to support Lavergne's speculation that this accident would have occurred even if the correct bolts had been used. The existence of a mere scintilla of evidence in support of the nonmovant's position is insufficient to survive the motion for a directed verdict. *Anderson*, 106 S.Ct. at 2512. Lavergne presented no evidence that the clamp would have failed due to the excess pressure regardless of the size and

threads of the bolts used.

Lavergne also presented no evidence to dispute Cameron's claim that the replacement bolts caused the accident. Lavergne contends that this claim was an issue of fact properly reserved for jury consideration. However, it was Lavergne's burden to adduce evidence sufficient to support a reasonable finding that the replacement of the bolts by weaker ones with shorter threads was not the cause of the accident or that they were replaced before the clamp left Cameron's control. Lavergne presented no evidence suggesting that the alteration occurred before the clamp left the Cameron plant or that the replaced, altered bolts, which clearly weakened the clamp, were not the cause of its failure.

Lavergne alternatively claims that the use of the wrong bolts with the clamp was foreseeable misuse for which Cameron was liable. Lavergne adduced no evidence, however, that Cameron had knowledge of any improper substitution of bolts prior to decedent's accident or that Cameron should have foreseen that the bolts originally issued with the clamp would be replaced with smaller bolts with inadequate threading that had been machine altered. Thus, there was no evidentiary basis on which a jury could have found that the improper use of such replacement bolts was foreseeable.

**Conclusion**

We find that Lavergne failed to adduce sufficient evidence to support a reasonable jury finding that Cameron was responsible for the accident. Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

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**FILED**
MAY 02 1990

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|---|---|---|
| DIANNE MYERS | : | CIVIL ACTION |
| -vs- | : | NO. 87-2595-L |
| CAMERON IRON WORKS | : | JUDGE SCOTT |

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## R U L I N G

This case was tried before us for four days beginning March 5, 1990. At the close of plaintiff's evidence defendant moved for a directed verdict pursuant to F. R. Civ. P. 50(a). The motion was taken under advisement at that time. At the close of defendant's evidence the motion was re-urged and we granted the motion. We now assign reasons for our decision.

This case arose out of a fatal accident which occurred on October 30, 1986 at the Vetco Gray, Inc. (Vetco) yard at Broussard, Louisiana. Decedent, Glen Lavergne, an employee of BOP Pressure Testers, Inc., was at Vetco on that day to pressure test a Shell Offshore, Inc. wellhead that had been refurbished by Vetco. Vetco employees, to seal off the wellhead for the test, had attached a connector

to the wellhead's top. A blind hub was then secured to the connector using an 18-3/4", 10,000 psi Cameron #27 swing bolt clamp. The Cameron clamp, which is the subject of this litigation, consisted of two halves with two bolts on each half. The bolts swung into slots located on the other clamp half and were then secured with nuts that fastened to the end of each bolt. The entire test assembly was put together before decedent arrived at the Vetco yard.

When decedent arrived at Vetco he connected a hose between a high volume pump on his truck and a valve on the blind hub. Decedent had instructions from Vetco to test the wellhead up to 15,000 psi, which is one and a half times the rated working pressure of both the Cameron clamp and the wellhead. Decedent attempted numerous times to apply pressure but encountered many equipment problems. On several occasions he changed the hose between the pump and the wellhead because of leaks and on one occasion he tightened a fitting.

The wellhead was placed in front of two metal safety screens owned and erected by Vetco and which were positioned at a 90 degree angle. The decedent's truck was parked behind the screens. Several Vetco employees testified at trial that they were present in the test area when decedent set up the test and began applying pressure to the wellhead. Gerald Elter, a Vetco shop foreman, arrived in the area after the testing had begun and saw decedent standing on the wellhead while it was under pressure of 15,000 psi. Mr. Elter immediately ordered another Vetco employee, Dennis Ceasar, to release the pressure. Mr. Elter told decedent not to leave the area behind the safety screens while pressure was on the wellhead. Mr. Elter then left the area, decedent finished his repairs and continued testing. After this point no one saw the decedent until after the accident. It is apparent, however, that decedent reap-

plied pressure to the wellhead and, in absolute violation of Elter's warning, was in the immediate area of the wellhead when the nuts stripped from the two bolts located on one of the clamp halves and the clamp halves flew apart. Decedent was apparently struck by one half of the clamp and died instantly.

Plaintiff, Cathy Lavergne sued Cameron Iron Works and others on her own behalf and on the behalf of her minor son Quinton Lavergne. At the time of trial the only remaining claim was a products liability claim against Cameron Iron Works. Specifically plaintiff claimed that the Cameron Iron Works clamp did not include a sufficient warning of the dangers of using the clamp at pressures higher than its rated working pressure.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court repeated the standard to be used by the District Court when determining whether there is sufficient evidence to submit a case to the jury in connection with a Motion for Directed Verdict:

> The trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. ... If reasonable minds could differ as to the import of the evidence however, a verdict should not be directed. ...As the Court long ago said in *Improvement Co. v. Munson*, 14 Wall 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:
>
> > Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would

> warrant the jury in finding a verdict in favor of that party. Formerly it was held that if it was held what is called a *scintilla* of evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (footnotes omitted).

*Id.*, at 250-251 (citations omitted). *See also Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*).

In this case plaintiff's primary allegation was that Cameron Iron Works manufactured a defective clamp in that it failed to warn users of the potential dangers resulting from using the clamp above its rated working pressure. *See Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926 (La. 1978). We disagree.

To recover under a strict products liability theory the plaintiff must prove "(1) that the injury or damage resulted from the condition of the product; (2) that the condition made the product unreasonably dangerous to normal use; and (3) that the condition existed at the time the product left the control of the manufacturer or supplier." *Bell v. Jet Wheel Blast*, 462 So.2d 166, 168 (La. 1985). Failure to warn of potential dangers can make a product unreasonably dangerous to normal use. *Chappuis, supra.*

First, we do not believe that defendant Cameron Iron Works failed to warn of potential dangers resulting from using the clamp regularly at pressures above its rated working pressure. The clamp was clearly marked that its rated working pressure was 10,000 psi. This was a warning and it was a sufficient warning to any knowledgeable user

that the clamp was to be used at or below that pressure.

Further, Cameron only marketed the clamp to knowledgeable users; this is not a product that is available to users outside the oil and gas industry. Vetco was clearly a knowledgeable user. In fact, Vetco is Cameron's main competitor in the oilfield clamp business. A more explicit warning was not necessary. No reasonable jury could find that the cause of this accident was a failure to warn. Vetco, who set up the test assembly and decided on the amount of pressure to be applied, already knew or should have known of the dangers of using a clamp, such as this one, regularly at a rate one and one half times its rated working pressure. A manufacturer is not required to warn a sophisticated or knowledgeable user of dangers of which they are or should be aware. *Scott v. White Trucks*, 699 F.2d 714 (5th Cir. 1983); *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976). Thus, we find that there was no failure to warn by Cameron.

Similarly, we find that the clamp was being misused. A manufacturer is entitled to assume that its product will not be put to extraordinary uses or unreasonably misused. *Christofferson v. Haliburton Co.*, 617 F.2d 403 (5th Cir. 1980). Although, it is common in the oilfield to test equipment at one and one half times its rated working pressure, it is not proper or reasonably expected for equipment to be used regularly at pressures above its rated working pressure. Testimony was offered that the clamp had been used in tests of 15,000 psi repeatedly since it had been at Vetco's Broussard yard. However, on each occasion the clamp was not the subject of the test, it was merely part of the test assembly. This constituted a serious misuse of the clamp. In designing tests to 15,000 psi, a clamp with a rated working pressure of 15,000 psi could have and should have been used.

Third, we find that the clamp had been substantially altered since the date of its manufacture. The clamp was not new. The only evidence we have to determine when it was manufactured is from its markings. Each clamp half was marked with a small inspectors stamp which indicated that it was manufactured at Cameron's Oklahoma City plant. The Oklahoma City plant only manufactured the 10,000 psi #27 clamp from 1974 through 1976. Examination of the clamp also revealed that three of the bolts on the clamp were not the type bolts the clamp came with originally. The two bolts which stripped out were apparently Cameron bolts for a different size Cameron clamp. These bolts had been "turned down" or machined to fit in this clamp. These bolts were shorter than the bolts the clamp was designed to use. The result from using shorter bolts was that thread engagement was considerably lessened and the strength of the connection and ultimately the clamp was greatly reduced.

A "manufacturer is under no duty 'to make a product that will last forever or will withstand abuse or lack of maintenance' or that is 'foolproof,' nor one whose component 'parts do not wear out' ". *Scott* at 717 (citations omitted). "Lapse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of defect existing at the time of manufacture." *Norris v. Bell Helicopter Textron*, 495 So.2d 976, 978 (La. App. 3d Cir. 1986). In this case no one knew what kind of use the clamp had been subjected to, nor where it had been used prior to its arrival at the Broussard facility. Additionally, no one knew when or how the altered bolts came to be on the clamp. These changes as well as the repeated misuse of the product substantially reduced the safety factors and efficiency of the clamp as it was manufactured and were factors in the accident. The con-

dition of the clamp at the time of the accident was not the same as it was when it left the manufacturer's control.

We find that plaintiff failed to make a showing concerning essential elements of her case and that there is no genuine issue as to material fact upon which a jury could properly proceed to find a verdict for the plaintiff. Defendant Cameron therefore is entitled to a directed verdict as a matter of law and judgment will be entered in Cameron's favor and against plaintiff Lavergne, dismissing plaintiff's claims with prejudice.

DONE AND SIGNED at Alexandria, Louisiana, this 2d day of May, 1990.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

COPY SENT

DATE 5-2-90
BY PA
TO: Johnson
Bott/Murphy
Ayo/Fontana
Cobb
Raymond